



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DEC 03 2005

Cleta Mitchell, Esq.
Foley & Lardner LLP
Washington Harbour
3000 K Street, N.W., Suite 500
Washington, D.C. 20007

RE: MUR 5568

Dear Ms. Mitchell:

On October 21, 2004, the Federal Election Commission notified Empower Illinois ("EI") and Empower Illinois Media Fund ("EIMF") of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). A copy of the complaint was forwarded to them at that time.

Upon further review of the allegations contained in the complaint, information provided by EI and EIMF, and information available to the public, the Commission, on November 17, 2005, found that there is reason to believe that EI and EIMF violated 2 U.S.C. §§ 433, 434, and 441a(f). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Statements should be submitted under oath.

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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public

If you have any questions, please contact Jin Lee, the attorney assigned to this matter, at (202) 694-1650

Sincerely,



Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

2
3 **FACTUAL AND LEGAL ANALYSIS**

4
5 RESPONDENTS: Empower Illinois
6 Empower Illinois Media Fund

MUR: 5568

7
8 **I. INTRODUCTION**

9 This matter concerns allegations that Empower Illinois ("EI") and Empower Illinois
10 Media Fund ("EIMF"), entities organized under Section 527 of the Internal Revenue Code, have
11 violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the
12 Act"). The complaint alleges, *inter alia*, that EI and EIMF are federal political committees but
13 have failed to register and report with the Commission and comply with the Act's contribution
14 limits and source prohibitions.

15 Based on the available information discussed below, there is reason to believe that EI and
16 EIMF have violated the Act by failing to register and report as political committees and
17 knowingly accepting excessive contributions.

18 **II. FACTS**

19 **A. FORMATION AND PURPOSE OF EMPOWER ILLINOIS AND**
20 **EMPOWER ILLINOIS MEDIA FUND**

21
22 EI and EIMF were both formed on August 20, 2004, twelve days after Alan L. Keyes
23 announced that he was running as the Republican candidate for the United States Senate from
24 Illinois.¹ Although the precise relationship between the organizations is unclear, both 527
25 organizations identify each other as an "affiliated" entity on their IRS registration statements and

¹ See EI, IRS Form 8871 (Aug. 20, 2004) and EIMF, IRS Form 8871 (Aug. 20, 2004), attached as Exs. A & B to Compl.; Maureen O'Donnell & Scott Fornek, *Keyes Fires Up GOP Faithful*, CHICAGO SUN TIMES, Aug. 9, 2004 (reporting Alan Keyes announced candidacy on Aug. 8, 2004).

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1 share the same address.² In addition, Jeffrey Davis, who is named as a Respondent in this
2 matter, is the President of both organizations and was the assistant treasurer for former Senate
3 candidate Jack Ryan, whom Keyes replaced after Ryan dropped out of the race.³ See Affidavit
4 of Jeffrey D. Davis at ¶¶ 2-3 (“Davis Aff.”), attached as Ex. 1 to Empower Illinois Response.
5 According to publicly available information, neither organization has been incorporated.

6 1. Empower Illinois Media Fund

7 EIMF states that its purpose is “[t]o engage in political advocacy and, in particular, to
8 conduct advertising to educate the citizens of Illinois regarding Illinois candidates, political
9 parties, and issues.”⁴ EIMF also has described itself as “a diverse coalition of concerned citizens
10 in the political process” that “is dedicated to educating Illinoisan’s [sic] regarding public policy
11 positions of candidates for federal, state and local office and mobilizing conservative voters.
12 These activities will help provide the information that Illinoisan’s [sic] need to see through the
13 misleading public policies and campaign themes of politicians.”⁵

14 In October 2004, EIMF aired what appears to be its first and only political advertisement,
15 entitled “What Do We Really Know About Barack Obama?” (“Obama Ad”), on cable and
16 television stations in the Springfield and Chicago, Illinois areas.⁶ Barack Obama was the
17 Democratic candidate for U.S. Senate in Illinois. This advertisement critiqued Obama’s voting

² See EI, IRS Form 8871; EIMF, IRS Form 8871.

³ See O’Donnell & Fornek, *supra* note 1 (discussing Keyes’ replacement of Jack Ryan)

⁴ EIMF, IRS Form 8871

⁵ [Http://web.archive.org/web/20041024134506/http://www.empowerillinoismediafund.org](http://web.archive.org/web/20041024134506/http://www.empowerillinoismediafund.org)

⁶ Davis Aff. at ¶ 18, Eric Krol, *New Ad to Criticize Obama’s Vote on Crime, Abortion*, DAILY HERALD, Oct 12, 2004, attached as Ex M to Compl

1 record in the Illinois legislature and debuted at the same time that Keyes and Obama were
2 scheduled to debate on October 12, 2004.⁷ The Obama Ad stated:

3 What do we really know about Barack Obama?

4
5 Did you know. . . .

6
7 Obama opposes tougher sentences for gangs who kill . . . innocent children.
8 --HB 1812, 2001

9
10 Obama wants schools to teach sex . . . to kindergarteners.
11 --SB 99, 2003

12
13 Obama supports aborting children even when they are . . . born alive.
14 --SB 230, 1997

15
16 STOP
17 LOOK
18 LISTEN

19
20 LEARN THE TRUTH ABOUT OBAMA⁸

21
22 EIMF spent \$55,542.00 on producing and placing the Obama Ad.⁹

23 Public statements made by Davis about the Obama Ad suggest that it was aired to counter
24 the Obama campaign. For example, commenting on the advertisement, Davis stated, "We tried
25 to stick to his record in the state senate because we know he's out of step with the Illinois voters .
26 . . . We want to make sure that people get a chance to at least take a look at it so they can make
27 an informed decision before election day."¹⁰ Davis also stated, "There is a disconnect between
28 the positions Barack Obama has taken as a State Senator and his moderate-sounding rhetoric

⁷ Krol, *supra* note 6

⁸ Compl at ¶ 24, Empower Illinois Response, Exhibit 2

⁹ EIMF FEC Forms 9, filed Oct. 13, 2004 and Oct 25, 2004

¹⁰ *Anti-Obama Ad Begins on Central Illinois TV*, ASSOCIATED PRESS, October 12, 2004, attached as Ex N to Compl.

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1 during this Senate campaign . . . As people listen to the debates and begin to make their decisions
2 in this important race, we want to make sure they have all the facts.”¹¹

3 In addition to producing and airing the Obama Ad, EIMF operated two websites. The
4 first website, www.empowerillinoismediafund.org, appears to have focused on Barack Obama.
5 The website criticized Obama, allowed viewers to play the Obama Ad, and made reference to the
6 November 2004 election by stating “Make a list of your own email contacts and send them a
7 message about the importance of November 2nd.” EIMF also appears to have paid for a second,
8 very similar website, www.truthaboutobama.org.¹²

9 Overall, EIMF reported to the IRS and the Commission that it raised \$92,000 between
10 August and October 2004 and spent \$58,042.00 on advertising costs, \$2,500 of which was for
11 website development and maintenance.

12 2. Empower Illinois

13 EI describes itself as “an educational and political advocacy organization formed for the
14 purpose of engaging Illinois citizens and empowering them to become involved in the political
15 process, to mobilize voters in Illinois on the basis of issues and philosophy to support quality
16 candidates in Illinois.”¹³ Although a functioning website cannot be found at this time, a web
17 page from a website designer who claims to be responsible for the EI website appears to include

¹¹ *Truth Squad Takes to the Air To Expose Obama Record*, THE ILLINOIS LEADER, October 11, 2004, at www.illinoisleader.com

¹² Because both EIMF websites are now password protected, we were unable to open the web pages. Some archived pages from October 2004 were available and are attached as Attachments B & C. Not all images could be downloaded on these archived pages. The quotations in the main text are taken from these pages.

¹³ EI, IRS Form 8871.

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1 a page from the EI website that lists "RACES TO WATCH," including "Bush v. Kerry," "Keyes
2 v. Obama," and "Crane v. Bean."¹⁴

3 EI raised approximately \$19,500 between August and October 2004.¹⁵ EI also spent a
4 total of \$18,802.50 for website development and maintenance, phone service, repayment of a
5 loan to a donor, and reimbursement of funds to Davis between August and December 2004.¹⁶

6 **B. FUNDRAISING BY EMPOWER ILLINOIS AND EMPOWER ILLINOIS**
7 **MEDIA FUND**

8
9 In a sworn affidavit submitted with his response, Davis stated, "Mr. Roeser and all
10 donors to Empower Illinois and Empower Illinois Media Fund were aware that the purpose of
11 both political committees was to engage in media communications and public advocacy
12 regarding candidates for office in Illinois and, in particular, that the communications would
13 involve discussions of the legislative voting record of Barack O'Bama [*sic*]." Davis Aff. at ¶ 10.
14 Indeed, based upon the retrievable images, the websites of both organizations appear to have
15 included images of Barack Obama and other federal candidates, *see supra* section II.A.2, and
16 requested donations. For example, EIMF's truthaboutbama.org website displayed a link stating,
17 "Donate now: Help educate Illinois voters," under a picture of Obama.¹⁷

18 Although neither the complaint nor the responses provided copies of fundraising
19 solicitations, an Internet message board posting included a solicitation purportedly received from
20 EIMF.¹⁸ The poster claimed to quote the solicitation as follows:

¹⁴ See <http://www.mircheideas.com/portfolio/index.phtml> Crane v Bean refers to the 2004 Congressional race in the Eighth District of Illinois

¹⁵ See EI, IRS Form 8872 (Jan 31, 2005)

¹⁶ *Id*

¹⁷ See <http://www.mircheideas.com/portfolio/index.phtml>

¹⁸ See <http://www.talkaboutbasketball.com/group/alt.sports.basketball.nba.chicago-bulls/messages/91763.html>.

1 Empower Illinois Media Fund, a 527 political organization, has launched a new
2 website (www.truthaboutobama.org) and has placed TV commercials on network
3 TV in central Illinois highlighting unknown facts about State Senator Barack
4 Obama's record while he served in Springfield.

5
6 The gap of information about Obama's record and his public profile couldn't be
7 larger.

8
9 DID YOU KNOW THAT . . .

10
11 AS CHAIRMAN OF THE HEALTH & HUMAN SERVICES COMMITTEE
12 OBAMA VOTED TO HAVE SEX EDUCATION TAUGHT TO CHILDREN IN
13 KINDERGARTEN?

14
15 Click here for more

16
17 Empower Illinois Media Fund's TV campaign aims at closing that gap. To read
18 about Obama's record in Springfield and to view the television ad that will air,
19 log on to www.truthaboutobama.org.

20
21 Finally, please consider helping us in this effort by contributing today. For as
22 little as \$100, you'll pay for a 30 second TV ad and help us reach THOUSANDS
23 of ILLINOIS VOTERS.

24
25 Think about the difference you'll make.

26 Click here to contribute.

27 Thank you for your time,

28 Empower Illinois Media Fund

29 To unsubscribe, click here.¹⁹

30
31 All of EI and EIMF's fundraising efforts appear to have occurred immediately prior to
32 the November 2004 elections. As stated above, between August and October 2004, EI raised
33 \$19,500.00 in contributions, including \$10,000 from Roeser on August 23, 2004.²⁰ During the
34 same time period, EIMF raised \$92,000 in contributions, including \$30,000 from Roeser on

¹⁹ *Id* (emphasis in original)

²⁰ See EI, IRS Form 8872 (Jan 31, 2005)

1 August 23, 2004.²¹ There appear to be no records showing that EIMF has raised any money after
2 this time period.

3 **II. ANALYSIS**

4 **A. POLITICAL COMMITTEE STATUS**

5 EI and EIMF are Section 527 organizations that file reports with the IRS. By law, a 527
6 organization is “a party, committee, association, fund, or other organization (whether or not
7 incorporated) organized and operated primarily for the purpose of directly or indirectly accepting
8 contributions or making expenditures, or both, for an exempt function.” 26 U.S.C. § 527(e)(1).
9 The “exempt function” of 527 organizations is the “function of influencing or attempting to
10 influence the selection, nomination, election or appointment of any individual to any Federal,
11 State, or local public office or office in a political organization,” or the election or selection of
12 presidential or vice presidential electors. 26 U.S.C. § 527(e)(2). As a factual matter, therefore,
13 an organization that avails itself of 527 status has effectively declared that its primary purpose is
14 influencing elections of one kind or another.

15 The Act defines a “political committee” as any committee, club, association, or other
16 group of persons that receives “contributions” or makes “expenditures” for the purpose of
17 influencing a federal election which aggregate in excess of \$1,000 during a calendar year.
18 2 U.S.C. § 431(4)(A). To address overbreadth concerns, the Supreme Court has held that only
19 organizations whose major purpose is campaign activity can potentially qualify as political
20 committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v.*
21 *Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”). The major purpose test is
22 a limiting construction on the statutory definition of a “political committee,” which means that

²¹ See EIMF, IRS Form 8872 (Oct 15, 2004); EIMF, FEC Forms 9 (Oct. 13, 2004) & (Oct 25, 2004)

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1 an organization meeting the statutory threshold for political committee status must also possess
2 the major purpose of campaign activity. *See MCFL*, 479 U.S. at 262.

3 The term “contribution” is defined to include any gift, subscription, loan, advance, or
4 deposit of money or anything of value made by any person for the purpose of influencing any
5 election for Federal office. 2 U.S.C. § 431(8)(A)(i). *See, e.g., FEC v. Survival Educ. Fund, Inc.*,
6 65 F.3d 285, 295 (2d Cir. 1995) (where a statement in a solicitation “leaves no doubt that the
7 funds contributed would be used to advocate [a candidate’s election or] defeat at the polls, not
8 simply to criticize his policies during the election year,” proceeds from that solicitation are
9 contributions).

10 EI and EIMF appear to have used fundraising solicitations clearly indicating that funds
11 received would be used to target the election or defeat of a clearly identified candidate, likely
12 resulting in contributions meeting the statutory threshold for political committee status. *See*
13 *Survival Educ. Fund*, 65 F.3d at 295. The fundraising solicitation described *supra* page 6 and the
14 truthaboutobama.org website state that funds received would be used to “reach” or “educate”
15 “Illinois voters” about Obama’s record; indeed, the e-mail fundraising solicitation states that
16 donations would “help us reach THOUSANDS of ILLINOIS VOTERS” by “pay[ing] for a 30
17 second TV ad” while containing a link to the Obama ad.²² (emphasis in original). Donors, thus,
18 were clearly informed that the organizations would engage in communications specifically
19 targeted against Obama and designed to mobilize voters against him. Because the solicitations
20 clearly indicated that funds would be used to finance advertisements directed at voters, not
21 merely to criticize Obama’s policies during an election year, they resulted in contributions under
22 the Act.

²² See <http://www.talkaboutbasketball.com/group/alt.sports.basketball.nba.chicago-bulls/messages/91763.html>

1 It appears that EI and EIMF are affiliated and share a single contribution limited under
2 the Commission's regulations, as they were established, maintained, and controlled by the same
3 person, Jeffrey Davis. *See* 11 C.F.R. §§ 100.5(g), 110.3(a)(1). Based on the amounts raised by
4 EI and EIMF, which include contributions from individual donors well in excess of \$5,000, it is
5 likely that funds received in response to such solicitations exceeded \$1,000.

6 In addition, the record suggests that the activities of EI and EIMF were organized to help
7 defeat Barack Obama in the November 2004 election for U.S. Senator from Illinois. While EI
8 and EIMF claim that their purpose was to engage and empower Illinois citizens regarding Illinois
9 candidates, the available information shows that almost all of EI or EIMF efforts focused
10 exclusively on Obama. For example, it appears that the only political advertisement produced or
11 paid for by EIMF was the Obama Ad, which was aired at the same time that the two candidates
12 were scheduled to debate. Similarly, based on available information, the websites run by EI and
13 EIMF appear to have focused on criticizing Obama's record and requesting funds to "Help
14 educate Illinois voters!" Finally, EI and EIMF were formed in August 2004, and their activities
15 appear to have been extremely limited since the November 2004 election.

16 Based upon the foregoing information, an investigation is warranted to determine the
17 exact nature of EI and EIMF's fundraising activities and disbursements for election related
18 advertisements and other public communications, the relationship between the two organizations,
19 and the scope of their activities.

20 **III. CONCLUSION**

21 Accordingly, there is reason to believe that Empower Illinois and Empower Illinois
22 Media Fund violated 2 U.S.C. §§ 433, 434, and 441a(f) by failing to register as a political

- 1 committee with the Commission, by failing to report contributions and expenditures, and by
- 2 knowingly accepting contributions in excess of \$5,000.

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